IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

WEDNESDAY, THE 4TH JULY 2007 / 13TH ASHADHA 1929

AS.No. 476 of 2001()

(AGAINST THE JUDGMENT AND DECREE DTD. 18/01/2001 OS.589/1995 ON THE FILE OF THE PRL.SUB COURT,TRIVANDRUM)

.....

APPELLANTS(PLAINTIFFS):

----

1. **D.PADMINI AMMA,**
   WIDOW OF LATE SHRI. VENUGOPALAN NAIR, HINDU,
   AGED 60, RESIDING IN 'MIDHILA', T.C.8/859,
   THIRUMALA P.O., TRIVANDRUM – 6.

2. **P.MADHURI DEVI,**
   WIFE OF P.ARAVIND, HINDU, AGED 38,...DO...DO....

3. **P.MALINI, W/O.RAMESH,**
   AGED 36, HINDU, RESIDING IN 'THIRUVATHIRA',
   TC 859/1, THIRUMALA P.O., TRIVANDRUM – 6.

BY ADV. SRI.G.S.REGHUNATH

RESPONDENTS: (DEFENDANTS):

----

1. **P.SAROJINI AMMA ALIAS RAJAMMA,**
   W/O.JANARDHANAN, HINDU AGED 76,
   RESIDING IN CHEMPALASSERI PUTHEN VEEDU,
   T.C.36/829, PERUMTHANNI,
   THIRUVANANTHAPURAM - (D I E D).

2. **SURESH KUMAR ALIAS BABU,**
   S/O.JANARDHANAN, HINDU,
   AGED 51, RESIDING IN ...DO...DO....

3. **CHARULATHA ALIAS CHANDRIKA,**
   D/O.SAROJINI AMMA, AGED ABOUT 58,
   ..DO..DO.... (DEFENDANTS 2 & 3 ARE THE LEGAL HEIRS OF D1)

...2/-

4. P.SYAMALAKUMARI, W/O.KARUNAKARAN,
AGED ABOUT 54, SIVA NILAYAM,
KARUNAMBIKA COLONY, VALANCHERRY, MADRAS,
PIN – 600 042. -* D I E D – LR'S IMPLEADED:

5. G.MURALI,
AGED ABOUT 61,
KODUNGANNOOR P.O., VATTIYOORKAVU,
TRIVANDRUM.

6. PONNAYYAN NADAR, AGED ABOUT 61,
RESIDING IN 'JIJI BHAVAN', MANCHAMPARA,
VAYILAKADA, KODUNGANOOR P.O.,
VATTIYOORKAVU, TRIVANDRUM.- ** DIED – LR'S IMPLEADED:

ADDL.R7 & R8 ARE IMPLEADED:

*R7. K.VINOD, S/O.KARUNAKARAN,
SHIVA NILAYAM, KARUNAAMBIKA COLONY,
VALANCHERI, CHENNAI – 600 042.

(*R4 DIED AND ADDL.R7 IS IMPLEADED AS LEGAL HEIR OF R4
AS PER ORDER IN I.A.NO.3838/2005 DTD. 10/01/07)

**R8. THANKAPPAN NADAR,
S/O.PONNAYYAN NADAR,
JIJI BHAVAN, MANCHAMPARA, VAYILAKADA,
KODUNGANOOR P.O., VETTIYOORKAVU, TRIVANDRUM.

(**R6 DIED AND ADDL.R8 IMPLEADED AS LEGAL HEIR OF R6
AS PER ORDER IN I.A.NO.2696/05 DTD. 10/01/07)

BY ADV. SRI.N.NAGARESH

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD
ON 04/07/2007, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:

ORDER IN I.A.NO.3025/2005 IN A.S.NO.476/2001

DISMISSED

4/07/2007 **SD/-K.PADMANABHAN NAIR, JUDGE**

/TRUE COPY/

KSS

K.PADMANABHAN NAIR . J.

A.S No. 476 of 2001

Dated this the 4th day of July 2007

JUDGMENT

The plaintiffs in O.S. No. 589 of 1995 on the file of the Sub-Court Trivandrum are the appellants. The appeal is filed against a decree and judgment passed by the trial court dismissing a suit for partition of 10 cents of property by metes and bounds allotment of that plot to the appellants. The case of the plaintiffs in the plaint was that 60 cents of property comprised in Survey No. 4087 of Anchamada village orginally belonged to Smt. Bhagavathy Amma Ponnamma. She had one son by name Venugopalan Nair and two daughters by name Sarojini Amma and Syamala kumari who are impleaded as defendants 1 and 4 in the suit. Defendants 2 and 3 are the children of the 1st defendant. Defendants 5 and 6 are impleaded as the alieners of defendants 1 to 4. It was averred that on 28-12-1963 late Smt.Bhagaathy Amma Ponnamma executed a will bequeathing 10 cents of property to her son Venugopalan Nair, 40 cents were jointly allotted to defendants 1 to 3 and 10 cents to the 4th defendant. It was contended that the ten cents of property bequeathed was not allotted by metes and bounds but only the extent of property allotted to each legatee was specified in the will. It was averred that Smt. Bhagavathy Amma Ponnamma died in the year 1965 and thereafter the defendants 1 to 4 and late Sri.Venugopalan Nair were in

joint possession and enjoyment of the plaint scheduled property. It was contended that the original of the will was in the custody of the 1st defendant and Venugopalan Nair was having only a photo copy of the same. The photocopy of the will was produced along with the plaint It was further averred that on 30-1-1989 Venugopalan Nair died and the 10 cents bequeathed to Venugopalan Nair devolved on the plaintiffs as his widow and children. It was averred that the will was accepted and acted upon by all parties concerned. The defendants are not willing for partition and allotment of separate possession of the 10 cents bequeathed to Venugopalan Nair. Hence the suit for partition

2. There is a specific averment in the plaint that after the death of Venugoplan Nair the parties were in joint possession and hence the plaintiffs valued the suit as provided under Section 37 (2) of the Court fees Act and paid the fixed court fee.

3. The 3rd defendant alone contested the suit . She filed a written statement admitting the relationship and execution of the will . The averment that the original will was in the possession of the 1st defendant was not denied. The averment that Sri.Bhagavathy Amma Ponnamma passed away in the year 1963 was admitted. But it was contended that the legatees had allotted properties separately , and their possession was not joint at all. In paragraph 8 of the written

statement it was specifically admitted that Venugopalan Nair had enjoyed 10 cents of property bequeathed to him for sometime. It was contended Venugopalan Nair sold his right over the 10 cents of property to the 4th defendant as per a sale deed. He had no right or possession over the 10 cents on the date of his death and hence nothing was left for his heirs to inherit. It was contended that the the relationship alleged also doubtful. It was also contended that the contention of the plaintiffs that there was a demand for partition is not true . The Trial court raises the following issues

(i) Whether the plaintiffs have right and title over the plaint property?
(ii) Is the property partiable?
(iii) What is the correct share to which parties are entitled to in case of partition?
(iv) Reliefs and costs.

4. No evidence was adduced. The learned Subordinate Judge held that since the plaintiffs did not produce the will the court is not in a position to adjudicate upon the title claimed by the plaintiff over the 10 cents. It was also held that the plaintiffs ought to have paid court fee for the market value of the property. It was held that the court fee paid was insufficient and dismissed the suit. Challenging that decree and judgment this appeal is filed.

5. The learned counsel appearing for the appellants has argued that the court failed to note that there is no dispute regarding the execution of a will and it was specifically admitted by the 3rd

respondent and the extent of property allotted to each of the legatees was also admitted. The only dispute raised was whether to the extent of the properties bequeathed alone were mentioned in the document or whether separate plots were given to each of the legatees. It is argued that the averment that the 1st defendant was in possession of the original will was also not disputed. It is argued that the court below failed to note that an admitted fact need be proved. It is also contended that the Court below went wrong in holding that the court fee paid was insufficient. It is argued that no contention was raised by the contesting defendant regarding sufficiency of Court fee. No issue was also raised by the court below. It is argued that or calculating the court fee the Court can only look into the averments in that plaint.

The suit was one for partition alleging joint possession. In the written statement field by the 3rd defendant there was an admission that the late Sri. Venugopalan Nair was in the possession of 10 cents of property bequeathed to him by late.Bhagavathy Amma Ponnamma. No contention regarding the valuation of the suit and sufficiency of court fee was raised in the written statement. The trial court went wrong in dismissing the suit on that ground even without raising an issue regarding the valuation and court fee. The court below failed to note before dismissing a suit for non payment of proper court fee an opportunity ought to have been afforded to plaintiffs to pay proper court fees So the dismissal of the suit on that ground is illegal and

liable to be set aside.

6. The next question arising for consideration is whether the dismissal of the suit on account of the non- production of the will is just and proper. The specific case put forward by the plaintiff that the properties originally belonged to late Smt.Bhagavathy Amma Ponnamma . She had a son and two daughters . Late Bhagavathy Amma Ponnamma was the owner of 60 cents of property. She bequeathed 10 cents of to her son and 10 cents one of her daughter by name Syamala kumari are the remaining 40 cents in favour of her daughter Sarojini Amma . It was averred in the plaint original will was with Sarojini Amma and the plaintiffs were having only a photocopy which was handed over by them to the deceased Venugopalan Nair. Photocopy of the will was produced along with the plaint. The contention of the plaintiffs were that the extent to each legatee was entitled alone was stated. But there was no allotment of each share by metes and bounds. The 3rd defendant who was the daughter of the 1st defendant though raised a contention that allotment was specific plots, did not produce the original deeds which is in their possession . But at the same time the execution of the will. So it is not a case which the plaintiff ought not have been non-sued on the ground of non production will especially in view or admission of the title of Venugopalan Nair. The appellant has produced a certified copy of the

will, before this court. that document is necessary to find out whether the allotment was in specific plots or only rights was specified. But being a suit for partition it is only just and proper that the plaintiffs be given an opportunity to adduce evidence before the trial Court, so the trial court can dispose of the suit in accordance with law. For that purpose the suit is to go back.

7. In the result the decree and judgment passed by the trail court are hereby set aside. The suit is remanded to the trial court for fresh disposal in accordance with law after giving a reasonable opportunity to both sides to adduce evidence. It is made clear that it is open to the 7th respondent also to contest the case and adduce evidence oral and documentary. The certified copy of the documents produced by the appellants along with I.A. 2531/2005 will also be transmitted to the trial court. There will be a direction to the trial court to dispose of the suit as expeditiously as possible at any rate within 4 months from the date of receipt of a copy of this judgment The parties shall appear before the court below on 6-8-2007.

K.PADMANABHAN NAIR,JUDGE

es